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In the Supreme Court of the United States

No. 367

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,

Petitioner and Appellant Below,

vs.

W. E. WILLIAMS, UNION PACIFIC RAILROAD COMPANY, and CHICAGO & NORTH WESTERN RAILWAY COMPANY,

Respondents and Appellees Below.

RESPONDENT W. E. WILLIAMS' BRIEF RESISISTING PETITION FOR CERTIORARI

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Where a plaintiff demands a trial by jury of any issue in the cause filed by him triable of right by a jury and a defendant files cross-claims against its co-defendants praying that "the Court find, determine and adjudicate" its rights against its co-defendants if a judgment be obtained by plaintiff against it but does not file a demand for jury trial on the issues raised by it in its cross-claims, plaintiff's demand for jury trial does not inure to the benefit of such defendant on its cross-claims. Under such circumstances a trial court does not err in holding that the cross-claims should be tried separately and in refusing evidence bearing solely on issues raised by such defendant's cross-claims.

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STATEMENT OF CASE

The statement of the case contained in the opinion of the United States Court of Appeals for the Eighth Circuit as set out in Appendix A, Page 19, et seq., of the Petition for Writ of Certiorari, is generally sufficient for the purposes of this resistance and, for the sake of brevity will not be repeated except as to facts pertaining to the issues raised by the Petition.

SUMMARY OF POINTS TO BE ARGUED AND AUTHORITIES RELIED ON BY RESPONDENT, WILLIAMS

I.

Where a plaintiff demands a trial by jury of any issue in the cause filed by him triable of right by a jury and a defendant files cross-claims against its co-defendants praying that "the court find, determine and adjudicate" its rights against its co-defendants if a judgment be obtained by plaintiff against it but does not file a demand for jury trial on the issues raised by it in its cross-claims, plaintiff's demand for jury trial does not inure to the benefit of such defendant on its cross-claims. Under such circumstances a trial court does not err in holding that the cross-claims should be tried separately and in refusing evidence bearing solely on issues raised by such defendant's cross-claims.

Rules 38 (c) and (d), Federal Rules of Civil Procedure.

Rule 20 (b), Federal Rules of Civil Procedure.

Rule 21, Federal Rules of Civil Procedure.

Rule 42 (b), Federal Rules of Civil Procedure.

II.

Petitioner, the railroad which supplied, furnished and delivered Rock Island box car RI 145287 to Respondent Williams' employer for grain loading, owed this respondent the duty to exercise reasonable or ordinary care to inspect such car and have it in such repair or condition that it could be used with reasonable safety or to

give notice or warning of the defects in the door and track mechanism of such car.

75 C. J. S. 333 (Railroads, § 924 (d)).

Jackson vs. C. M., St. P. & P. R. R. Co., 238 Iowa 1253, 30 N. W. 2d 97, 99, 100, and cases cited therein.

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Waldron vs. Director General of Railroads, (CA-4), 266 F. 196.

Sykes vs. St. Louis-San Francisco Ry. Co., 178 Mo. 693, 77 S. W. 723.

ARGUMENT

POINT I.

Where a plaintiff demands a trial by jury of any issue in the cause filed by him triable of right by a jury and a defendant files cross-claims against its co-defendants praying that "the Court find, determine and adjudicate" its rights against its co-defendants if a judgment be obtained by plaintiff against it but does not file a demand for jury trial on the issues raised by it in its cross-claims, plaintiff's demand for jury trial does not inure to the benefit of such defendant on its cross-

claims. Under such circumstances a trial Court does not err in holding that the cross-claims should be tried separately and in refusing evidence bearing solely on issues raised by such defendant's cross-claims.

The facts in the instant case support the decision of the Trial Court in ordering separate trials and refusing to receive evidence bearing solely on issues raised by petitioner in its cross-claim and the affirmance of such order by the Court of Appeals for the Eighth Circuit.

On February 4, 1955, this respondent (plaintiff in the original action) filed his Complaint in the District Court of the United States, Southern District of Iowa, Western Division (R. 1). On March 9, 1955, within ten days after defendants had filed Answers to the Complaint, plaintiff filed demand for jury trial of any issue "triable of right by jury" (R. 18). On March 16, 1955, the first pre-trial conference was held (R. 18). On September 8, 1955, a second pre-trial conference was held (R. 51). On the same date that the second pre-trial conference was held defendant, Rock Island (petitioner herein) filed cross-claims against defendants, North Western and Union Pacific in which it prayed that "in the event any liability is imposed on this defendant" that the "Court find, determine and adjudicate" its rights against the other defendants (R. 45, 51). Copy of said cross-claims were not served upon this Respondent or his counsel nor was a copy of the cross-claim of the North Western against the Rock Island, which had been filed August 18, 1955, served upon this Respondent or his counsel. Neither this Respondent nor the Honorable William F. Riley, Judge of the District Court, had any knowledge

of said cross-claims or the nature thereof at the time of the second pre-trial conference so naturally no question as to separation of trials was raised at that time by either this Respondent or the Court. The defendants had knowledge thereof but they raised no question with regard to separation of trials.

The plaintiff first learned of said cross-claims on the day the second pre-trial conference was held when counsel for plaintiff happened to see a copy of the Rock Island cross-claim that was delivered to defendant, Union Pacific. Counsel then made inquiry whether any other defendants planned to file cross-claims against their co-defendants and was advised that the defendant, North Western, had already filed a cross-claim against defendant Rock Island and planned to do so against defendant, Union Pacific, and that defendant, Union Pacific, planned to file cross-claims against the other defendants.

This Respondent, after reading the cross-claims, never raised any question regarding separation of trials as it appeared obvious from the prayers thereof that the proceedings thereon would be held separately as the relief prayed therein was bottomed on the plaintiff making a recovery against one or more of the defendants, in which event it was prayed that the *Court* make the requested findings and adjudications. The other respondents and the the Court likewise so interpreted the cross-claims.

The first time the trial Court found it necessary to declare its position with regard to separate trials was when petitioner (defendant, Rock Island) attempted to introduce evidence pertaining solely to issues raised by its cross-claims, which consisted of certain contracts and

agreements which it had allegedly entered with the other defendants and to which plaintiff was not a party. Petitioner claims it was surprised by this declaration. This Respondent contends petitioner could have been no more surprised by this declaration by the Court than the Court and the respondents were surprised by petitioner's contention that the plaintiff's case and the cross-claims should be tried in the same proceedings. All except petitioner had presumed from the reading of the pleadings that the plaintiff's claim would be tried to a jury and then, if plaintiff obtained a verdict against one or more of the defendants, the Court would proceed to hear the evidence on the cross-claims (R. 299).

This Respondent contends that the demand for jury trial made by him did not give the Petitioner a right to a jury trial as to the issues raised by its cross-claims.

Rules 38 (c) and (d), Federal Rules of Civil Procedure, provide:

"(c) SAME: SPECIFICATION OF ISSUES. In his demand a party may specify the issues which he wishes so tried otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

"(d) WAIVER. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5 (d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

This Respondent in his demand for jury trial specified that issues in the cause filed by him triable of right by a jury be so tried. The demand did not encompass issues that might later be raised by any defendant who might file a cross-claim against one of its co-defendants. Under Rule 38 (c), Federal Rules of Civil Procedure petitioner was not entitled to presume his cross-claims would be tried to a jury, let alone presume said cross-claims would be tried in the same proceedings as plaintiff's claim. Petitioner did not file a demand for jury trial and, therefore, under Rule 38 (d), Federal Rules of Cicil Procedure, waived its right to have the issues raised in its cross-claims so tried.

This Respondent also contends that the trial Court did not abuse its discretion in holding that the plaintiff's claim and the various cross-claims should be tried separately.

Rule 20 (b), Federal Rules of Civil Procedure, provides:

> "(b) SEPARATE TRIALS. The court may make orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice."

Rule 21, Federal Rules of Civil Procedure, provides:

> "* * * Any claim against a party may be severed and proceeded with separately."

Rule 42 (b), Federal Rules of Civil Procedure, provides:

"(b) SEPARATE TRIALS. The Court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

From the reading of the above rules it is readily apparent that the Trial Court has wide discretion in ordering separate trials where the entry of such an order serves the ends of justice and prevents prejudice to any of the litigants. The case of *Meyercheck vs. Givens*, 180 F. 2d 221, so holds. In 3 Moore's Federal Practice 2908, Professor Moore states that the Court may proceed on motion of any party or on its own initiative at any stage of the action and may prescribe "such terms as are just." The statement of petitioner in its Petition under the heading "grounds on which jurisdiction is invoked" notwithstanding, this Court, in considering Rule 42 (b) in case of *United States vs. Yellow Cab Company*, 340 U. S. 543, 71 S. Ct. 399, held that this rule gives the Court ample power to deal with a problem by ordering a separate trial of any claim or of any separate issue or issues. A review of the pleadings and facts as well as the record of the trial in the instant case will readily disclose why the trial Court felt it incumbent to clarify its position when Petitioner attempted to adduce evidence pertaining to its contracts and agreements with the other defendants. When it became obvious that the appellant was attempting to modify the common-law rights of the plaintiff, which rights were in tort and not in contract, by introducing evidence or seeking to introduce evidence of alleged contractual ar-

rangements entered by defendants, it was obvious to the Court and apparently to all parties except Petitioner that to permit such procedure could result only in utter confusion in the minds of the jury and prevent them from determining the primary issue between plaintiff and defendants as to whether or not the defendants or any of them were guilty of actionable negligence which might entitle Williams to the right to recover damages from one or more of the defendants. It is well-established law that the defendants, by contract, cannot alter the common-law duty that any of them might have to a plaintiff. If the law were otherwise, it would be impossible for a person injured as a result of a negligent act ever to be certain that he was pursuing his claim against the right party.

The sole issues that existed in the controversy between Williams and the railroads in the instant case were as to negligence, contributory negligence, proximate cause and damages. The trial Court extended itself in affording Petitioner every opportunity to adduce testimony and evidence with regard to these issues. However, in pursuance of the ends of justice, it wisely recognized that to admit evidence involving the internicine warfare among the railroads before the jury could only lead to confusion in the minds of the jury and defeat the substantial ends of justice which it had the duty to protect. None of the proffered testimony would have had any bearing on the common-law duty which the Courts have imposed upon railroads furnishing cars to a shipper. Instead, it was all directed toward the issues of contribution or indemnity which only became pertinent and material in the event an adverse verdict were re-

turned against one or more of the defendant railroads. The North Western and Union Pacific recognized this fact (R. 299). Repeatedly the Court advised counsel for the Petitioner that the exclusions of the proffered testimony on trial before the jury did not mean that such evidence and testimony would be considered immaterial and irrelavant on trial of the issues between the defendants on their cross-claims (R. 284, 287, 288, 297, 300, 315, 347, 351). In fact, upon the trial of the cross-claims before Mr. Justice Charles W. Whittaker (then United States Circuit Judge serving as District Judge by assignment due to the illness of the Honorable William F. Riley) petitioner was permitted to introduce all evidence pertaining to the alleged contracts and agreements entered between the various defendants.

In the trial of plaintiff's case it appears that the Petitioner hoped that it would be able to adduce this immaterial and irrelevant evidence from its witnesses and thus confuse the Court and jury as to the ultimate issue of negligence. Evidently it felt that if it could show that it received no revenue from the handling of this car and that the shipper-carrier relationship which it had anticipated would materialize at the time that it furnished and delivered the offending car did not, in fact, materialize, that it would have an emotional argument to make to the jury. In its argumenf accompanying its Petition it appears that it is seeking to do the same thing before this Court. However, it is to be pointed out that the Petitioner has generally benefited from its method of furnishing cars to the Kansas Grain Company. The record in this case discloses that during January and February of 1953 the Rock Island received the line-haul reve-

nue from 51 cars shipped from the Kansas Grain Company over its line which had been furnished to Kansas Grain Company by other railroads (R. 463).

A review of the record in the instant case will readily disclose that the Petitioner was not prejudiced by any action taken by the Trial Court but instead every benefit was extended to the Petitioner, short of reversible error, in permitting the case to go to the jury against all three defendants rather than solely against the Petitioner.

POINT II.

Petitioner, the railroad which supplied, furnished and delivered Rock Island Box Car RI 145287 to Respondent Williams' employer for grain loading, owed this Respondent the duty to exercise reasonable or ordinary care to inspect such car and have it in such repair or condition that it could be used with reasonable safety or to give notice or warning of the defects in the door and track mechanism of such car.

The legal principles applicable in the instant case are set out very clearly in 75 C. J. S. 333, *et seq.* (Railroads, Sec. 924 (d)), as follows:

> "A railroad company owes a duty to all persons who are required to go on or about its cars or cars which are furnished or delivered by it in connection with its business to exercise reasonable or ordinary care to inspect such cars, and to have them in such repair or condition that they may be used with reasonable safety, or to give notice or warning of defects in such cars which are discoverable by due inspection to persons who are entitled to such notice or warning. These duties may be owing to the shipper and to his employees, with respect to loading,

or to the consignee and to his employees, with respect to unloading. A breach of a duty of this natures constitutes negligence, and, for such a breach, the railroad company may be liable for resultant injury to the person to whom the duty is owing, including the shipper, an employee of the shipper, any other person rightfully about the car in connection with loading or shipment, the consignee, or an employee of the consignee. The liability of the railroad company to a shipper's employee for furnishing a defective car arises ex delicto and not ex contractu, and the duty does not depend on the existence of a contract relationship."

These principles have been consistently followed by every jurisdiction confronted with a case similar to that presently before this Court, statements of petitioner in its petition under the heading, "Grounds on which Jurisdiction is Invoked" and in its argument under the heading "The Liability of the Railroads" notwithstanding.

The Courts generally recognize that the liability of a railroad company to a shipper's employee for furnishing a defective car arises ex delicto and not ex contractu and the duty to furnish a car free from defects does not depend on the existence of a contract relationship. (See *Pennsylvania Railroad Co. vs. Hummel*, 167 F. 89, 92 (CCA 8) 541; *St. Louis-San Francisco Railroad Company vs. Ewan* (CCA 8), 26 F. 2d 619; *Waldron vs. Director General of Railroads* 266 F. 196.) Despite the consistent pronouncement by the Courts in this regard, Petitioner tenaciously holds to its viewpoint that the shipper-carrier relationship must exist before it can be held liable for injuries sustained by an employee of a shipper to which it has furnished a car. In its brief before the Court of Appeals for the Eighth Circuit it

felt the emphasis of the word "carrier" would prove to be the magic key that would release it from its bonds of this Respondent's judgment. Before this Court it appears for the first time to feel that the magic words are "in connection with its business." We submit to the Court that there can be no question but what the furnishing of railroad cars by a railroad to a shipper which does extensive shipping on its line is an activity in connection with that railroad's business. At the time that Rock Island Box Car RI 145287 was delivered to the Kansas Grain Company, this Respondent's employer, the petitioner fully anticipated that it would receive said car for shipment or other cars which had been furnished said shipper by other railroads, in lieu thereof (R. 412). The petitioner was the only railroad that had an opportunity or a duty to inspect said car prior to its delivery. It is obvious that the petitioner recognized its duty to inspect said car as it had said car inspected by its car inspector, one Bert Neuman, prior to delivering the car for spotting at the Kansas Grain Company and had it carded "O. K. for grain loading" (R. 228, 301). The petitioner no longer contends that it was free from negligence in making such inspection but in fact admits that there were defects in the car (P. 4, Petition for Writ of Certiorari).

In taking the position that the Court of Appeals for the Eighth Circuit has failed to follow Iowa substantive law, Petitioner continues to fail to recognize the factual distinction existing in cases in which the plaintiff is an employee of a consignee of a car rather than an employee of a shipper. The Courts generally recognize that when the person injured is an employee of a consignee

the duty to furnish a car free from defects rests upon all railroads having a duty and opportunity to inspect the car. Thus, in the case of *Jackson vs. C. M. St. P. & P. R. R. Co.*, 238 Iowa 1253, 30 N W. 2d 97, where an employee of a consignee was injured, the Iowa Court held the Milwaukee Railroad, the initial carrier of the offending car, liable for supplying a defective car. That the Iowa Court did not look to see whether or not a contract relationship existed between the plaintiff and defendant is obvious when one reads the case. The Iowa Court couches its language solely in tort. It views an employee of a consignee as an "invitee" to whom defendant owed the duty of reasonable care. It does not search for any contractual relationship—either that of shipper-carrier or carrier-consignee—upon which to hinge the right-duty relationship, but looks solely to a basis for tort liability. The cases cited by the Iowa Court are the same cases upon which this respondent relies as further authority for his position. While this is the only Iowa case in point, it is obvious that the principles of substantive law to be gleaned from the Iowa decision are consistent with the principles applied by the various federal and other state courts.

In all of the cases cited by the Petitioner, the Court will find that the Court having jurisdiction of the case held only such railroads liable as had an opportunity or duty to inspect the car. Thus in cases involving injuries to an employee of the shipper, the railroad furnishing the car has always been held liable. In cases involving an employee of a consignee of a car, the initial carrier or delivering railroad has been held liable as they each have a duty to inspect the car before accepting same for

a line-haul over their line. As neither an intermediate carrier nor a switching carrier have the opportunity or duty to inspect a car the Courts have never held such carriers liable for furnishing defective cars. We see no reason to review each of the cases separately due to the fact that the same general principles apply in each case.

As the petitioner knows a switching carrier has no duty to inspect and therefore has never been held liable for a defective car it seeks to have itself so classified. However, the facts do not bear it out in this regard. The petitioner furnished the car on an order placed by this Respondent's employer (R. 228, 412, S. R. 3). Before the car was placed it was inspected by one of petitioner's car inspectors and carded "O.K. for grain loading" (R. 228, 301) as it recognized its duty to furnish a car free from defects. It was a customary practice for it so to do as it knew it was the only railroad that had a duty to inspect the car. While it anticipated it might receive the car for line-haul, it is obvious it was not too much concerned whether it received the same car back or not as the method used by the grain elevator did not work a hardship upon it. In December, 1952, January, 1953 and February, 1953 it had furnished 70 cars to the elevator, only 16 of which were returned to it for line-haul (R. 462). However, in January, 1953 and February, 1953, it received the line-haul on 51 cars furnished by other railroads (R. 463), making a total of 67 cars for which it received the line-haul revenue. We presume the reason it did not include the total number of cars furnished by other railroads and for which it received the line-haul revenue during the same 3-month period used in showing cars furnished by it was because

it actually received more cars for line-haul revenue than it furnished. During the same 2-month period as that used in showing the 67 cars received by it which were furnished by it or by others, Petitioner only furnished 62 cars (R. 462, 463).

It is interesting to note that before this Court Petitioner no longer contends the North Western is liable. This is because it finally recognizes that the North Western was only a switching carrier which took the car from Petitioner for placing on this Respondent's employer's side track, and therefore had no duty to inspect the car.

Petitioner erroneously states in its petition that this Respondent has at times taken the position that since Petitioner was called upon to switch the car back to the Union Pacific such facts constitute a basis for holding that the car was being used in Petitioner's business when this Respondent sustained his injury. While this Respondent has not taken such position we do not believe such position to be entirely without merit. There is no question but what the Petitioner is in the business of furnishing cars to shippers, switching cars and delivering cars along its line. We certainly do not see how Petitioner can hope to confine its business solely for the purpose of this litigation. This Respondent is certain this Court will experience no difficulty in seeing through the shallow argument that this Respondent's employer was not a "shipper" as far as Petitioner is concerned and therefore it owed it or its employees no duty. If it is not a "shipper" the Petitioner has been receiving a tremendous amount of revenue from a source heretofore unknown in railroad circles, and did so during the

two-month period it used in formulating Exhibits 25 and 26.

Petitioner also takes the untenable position that the lower courts in the instant case have held that the Union Pacific only can become liable by signing a bill of lading. A reading of the decisions of the lower courts will readily disclose that the lower courts simply held that Union Pacific could not be liable because it did not have an opportunity to inspect the car prior to the time that this Respondent sustained his injuries. Under the record in the instant case the Union Pacific has established that it did not even have knowledge that the offending car was sitting on a side track in Council Bluffs, Iowa, and was to be shipped over its line until the day after the accident. The Courts felt that under such circumstances it certainly could not be held liable for failure to inspect the car.

This Court may wonder why this Repsondent named all three railroads as defendants if it is so convinced Petitioner is liable. Until shortly before the Statute of Limitations was to run on this Respondent's claim he had been negotiating with petitioner on his claim. Shortly before the running of the Statute Petitioner for the first time took the position it was not liable but instead the North Western and Union Pacific were liable. While counsel for this Respondent in the short time remaining could find no authorities shifting the liability as Petitioner contended, in order to preserve the claim he felt it necessary to include the other two railroads as defendants. Counsel frankly admitted in answer to an inquiry by Mr. Justice Whittaker, when he presided at the trial on the cross-claims, and to the Court of Appeals

for the Eighth Circuit that he could not find any basis for their liability other than it might exist under the cross-claims and stated his belief Judge Riley permitted the case to go to the jury against said defendants solely to prevent the necessity of retrial if the appellate courts decided they should have so remained due to the pendency of trial on the cross-claims.

SUMMARY

Rule 19 (1) of the Revised Rules of this Court provides.

> "(1) A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are important and special reasons therefor * * *."

This Respondent does not feel that this case falls within the requirements. Rule 42 (b) has been construed by this Court. Further, the facts in the instant case disclose that the Trial Court merely performed an obvious necessity when it refused to permit Petitioner to attempt to confuse the jury with issues upon which it had waived a jury trial by failure to make a timely demand therefor. With regard to the substantive law, there is no inconsistency between the law applied by the Trial Court and the Court of Appeals and the substantive law of the State of Iowa nor with the substantive law applied in the other Circuits. Further, there is no question of great public importance that necessitates this Court making a pronouncement of public policy.

For these reasons this Respondent feels the petition for writ of certiorari in the instant case should be denied.

Respectfully submitted,

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